

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
EQUAL EMPLOYMENT OPPORTUNITY COM MISSION,
an agency, and the UNITED STATES OF AMERICA,

Plaintiffs,

-against-

Docket No.

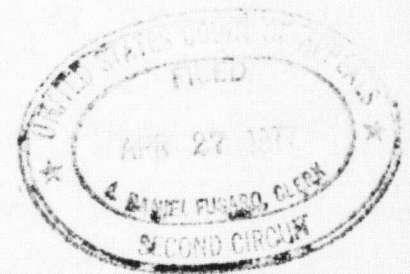
WOOD, WIRE AND METAL LATHERS INTERNATIONAL
UNION LOCAL NO. 46, THE JOIN APPRENTICE-
SHIP COMMITTEE OF THE EMPLOYING METALLIC
FURRING AND LATHING ASSOCIATION OF NEW YORK
AND LOCAL NO. 46 of the WOOD, WIRE AND
METAL LATHERS INTERNATIONAL UNION,

77-6013

Defendants-Appellee

DAVID LLOYD FOREMAN,

Movant-Appellant.



-----x
BRIEF ON BEHALF OF
DEFENDANTS - APPELLEES

WALTER M. COLLERAN
Of Counsel

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P.C.
COUNSELLORS AT LAW
1140 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10036
(212) 986-3737

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Walter M. Colleran

-----x
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
an agency, and the UNITED STATES OF
AMERICA,

Plaintiffs,

-against-

WOOD, WIRE AND METAL LATHERS INTER-
NATIONAL UNION LOCAL NO. 46, THE JOINT
APPRENTICESHIP COMMITTEE OF THE EMPLOYING
METALLIC FURRING AND LATHING ASSOCIATION
OF NEW YORK AND LOCAL NO. 46 of the WOOD,
WIRE AND METAL LATHERS INTERNATIONAL
UNION,

Docket No.

77-6013

Defendants-Appellees,

DAVID LLOYD FOREMAN,

Movant-Appellant
-----x

BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES

WALTER M. COLLERAN
Of Counsel

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P.C.
1140 Avenue of the Americas
New York, New York 10036

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
THE FACTS	
The Background.....	2
The Rule In Question.....	4
The Administrator's Decision.....	5
SUMMARY OF THE ARGUMENT.....	9
POINT I - THE DISTRICT COURT ACTED PROPERLY IN DISMISSING MOVANT'S MOTION AND SUSTAINING THE DECISION OF THE ADMINISTRATOR.....	10
POINT II - THE ADMINISTRATOR'S DECISIONS WERE FREE OF REVERSIBLE ERROR.....	15
CONCLUSION.....	18

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Albemarle Paper Co. v. Moody</u>	
442 U.S. 405 (1975).....	11
<u>Gunther v. San Diego & Arizona Eastern Ry. Co.</u>	
382 U.S. 257.....	12
<u>Marcy Lee Mfg. Co. v. Cortley Fabrics Co.</u>	
241 F. 2d 894 (2nd Cir. 1961).....	16
<u>Matter of Exercycle Corp.</u>	
9 N.Y. 2d 329.....	16
<u>United States v. Wood, Wire and Metal Lathers</u> <u>International Union Local No. 46</u>	
328 F. Supp. 429 (S.D.N.Y. 1971).....	11
<u>United States v. Wood, Wire and Metal Lathers</u> <u>International Union Local No. 46</u>	
471 F. 2d 408 (2nd Cir. 1973) <u>cert.</u> <u>denied</u> 412 U.S. 939.....	10
<u>United Steelworkers of America v. Enterprise</u> <u>Wheel and Car Corp.</u>	
363 U.S. 593.....	12
 <u>Statutes:</u>	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000-5(g).....	13,14

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :
an agency, and the UNITED STATES OF :
AMERICA, :

Plaintiffs, :

-against- :

Docket No. 77-6013

WOOD, WIRE AND METAL LATHERS INTERNATIONAL :
UNION LOCAL UNION NO. 46, THE JOINT :
APPRENTICESHIP COMMITTEE OF THE EMPLOYING :
METALLIC FURRING AND LATHING ASSOCIATION :
OF NEW YORK AND LOCAL NO. 46 OF THE WOOD, :
WIRE AND METAL LATHERS INTERNATIONAL :
UNION, :

Defendants-Appellees, :

DAVID LLOYD FOREMAN, :

Movant-Appellant :

-----x

BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES

STATEMENT OF THE CASE

The Movant-Appellant DAVID FOREMAN (Hereinafter called "Foreman") appeals from an order of the United States District Court for the Southern District of New York (Marvin E. Frankel, D.J.) dated November 16, 1976, which confirmed an order of the Administrator dated September 27, 1976.

The single page Memorandum and Order of Judge Frankel states:

"This is a rare case. It is complained that the able Administrator, George Moskowitz, Esq., has utterly misconceived the evidence and the Decree he has administered for so long, so that the complainant, Mr. David Lloyd Foreman, has had an insufficient award of back pay. It is of some interest that the plaintiff, United States of America, does not join in the motion.

"The court has reviewed the motion papers, including the hearing record and, of course, the Administrator's decision. The claims of error are found to lack merit. Indeed, the movant has misconceived both the issues before the Administrator and the corresponding premises of his rulings. The decision in question should be, and it is, sustained. Accordingly, Mr. Foreman's motion is denied."

THE FACTS

The Background

The action herein was filed on May 22, 1968 under Title VII of the Civil Rights Act of 1964 to enjoin an alleged pattern of discrimination against Negroes by defendant Wood, Wire and Metal Lathers International Union, Local No. 46 (hereinafter referred to as the "Union" or "Local 46").

On February 7, 1970 the parties entered into a settlement agreement which became the basis of a consent decree dated February 24, 1970. The agreement, described by Judge Frankel as "very innovative," provided for the appointment of an Administrator who was empowered by the parties "to take all actions . . . as he deems necessary to implement the provisions of this agreement, to ensure

the performance of this agreement and to remedy any breach thereof." He was further given the power to decide any questions or disputes or complaints arising under this agreement, including questions of interpretation of the agreement and claims of violations of this agreement . . . All decisions of the Administrator shall be in writing and shall be final." George Moskowitz, Esq., was designated by the court to fill this role.

Local 46, an AFL-CIO affiliate, has jurisdiction over men engaged in furring, metal lathing and concrete reinforcing in the five counties of New York City and Nassau, Suffolk, Westchester, as well as the southern portion of Rockland County. Under its collective bargaining agreements it has the exclusive right to refer its members, permit men and apprentices, for employment in these areas. To accomplish this purpose the Union operates a hiring hall. The 1970 settlement agreement provided that rules and regulations be adopted to insure the non-discriminatory referral of men from the hall. In the absence of agreement between the parties, the Administrator was authorized to establish such rules which he did and which were confirmed by the District Court.

This appeal deals with one of such rules designated in the Hiring Hall Rules and Regulations promulgated by the Administrator as Rule VII, which reads as follows:

"VII. LAYOFFS

No workman shall be laid off until all workmen at his job performing the same class of work who commenced work subsequent to him have been laid off. Nothing in this paragraph shall derogate from the right of an employer to lay off workmen for cause. Any workman who challenges the basis of his layoff shall notify the Administrator in writing within three (3) days of such layoff, setting forth his reasons for regarding the layoff as improper. The workman shall simultaneously send copies to the Union and his employer."

This was one of the more controversial rules issued over the strong objections of the Union, and this case marks the first time that this rule came before the Administrator for application and interpretation. It introduced into the construction industry the concept of job seniority while at the same time preserving the employer's right to discharge for cause. One of the chief difficulties with this judicial attempt to regulate the industry is that the employers were never made parties to the original Title VII action, except for their participation on the Joint Apprenticeship Committee, thus the Administrator has no jurisdiction over the employers who do the actual hiring and firing of the men. In that respect the term "hiring hall" is somewhat of a misnomer. It would be more

accurate to describe it as a "referral hall" where men are sent to the jobs upon request. The employer has always had the right to reject or accept the men referred from the hall and to retain them in its employ as long as it chose to do so.

The Administrator's Decision

The Administrator, in construing this rule for the first time, recognized the difficulty in applying it to the particular set of facts before him. In his initial decision dated September 25, 1975, on page 2 thereof, he points out that past practice between the Union and their contractors "appears to accept the right of employers to establish the standard and quality of work, as well as the rate of productivity required of employees. The collective bargaining agreements between the Union and the several employer associations contain no requirement -- customary in other industrial collective bargaining contracts -- that discipline or discharge be based upon just or proper cause. Nor does it appear that such agreements contain arbitration provision for review of the propriety of terminations." He further points out that the employers have not been made parties to the litigation.

Now faced for the first time with the dilemma of trying to apply the rule, which he imposed upon the Union, in the light of the history of the industry, the terms of the collective bargaining agreements, the absence of the employers as parties hereto, the Administrator concludes that the thrust of Rule VII "clearly imposes an obligation upon the Union to make reasonable inquiry into the cause for termination. He specifically states

at page 4 thereof:

"On the question before me I do not regard it as essential to determine whether the employer had just or good cause to terminate Mr. Foreman. The issue before me, as I see the problem, is whether the Union fulfilled its duty under the Hiring Hall Rules and Regulations to make its own inquiry - especially upon receiving a complaint from a permit holder who is a non-white minority - to determine if just cause existed."

After spelling out what he deemed to be the Union's obligation under this Rule and the manner in which claims of improper layoff should be handled by it, the Administrator awarded the complainant, as damages to be paid by the Union, four weeks' wages.

Inasmuch as this was the first time the Administrator had to apply Rule VII to a terminated employee, and because he introduced a set of procedures for the Union to follow in future cases, the Union did not feel it should be penalized in this case. Accordingly it filed a motion for reconsideration on October 8, 1975, within two weeks after the decision of September 25, 1975. Thereafter, in opposing the Union's motion for reconsideration, the complainant filed a cross-motion seeking full back pay from the date of layoff to the date of reinstatement. Hearings were held thereafter to give the parties an opportunity to be heard and a decision rendered on September 27, 1976 denying complainant's motion for further back pay.

In that decision the Administrator cited a number of factors which he felt he could not ignore, namely that the lather work force had dropped from the time Foreman was laid off to approximately a month thereafter, that after he was laid off others who had been working with him in the coffer-dam gang were also laid off; that the General Lather Foreman did not regard David Foreman as a satisfactory worker; and that another government agency, the United State Environmental Protection Agency, as a result of an independent investigation, determined that his layoff was not a consequence of race.

With these factors in mind the Administrator reaffirmed his original decision that the Union was derelict in its duty to secure an explanation for the layoff and goes to great lengths to reiterate that Local 46 did not cause Foreman to lose his job or his earnings, nor could it compel the contractor to continue Foreman in employment. On page 3 of that decision he nails down his reasoning with the following findings:

"Neither the settlement stipulation, nor the collective agreement between the Union and the industry signatories provide for Union review of the propriety of layoffs or terminations of lathers . . . I find no express language in the Collective Agreement, the Settlement Stipulation or the Hiring Hall Rules and Regulations from which I may reasonably extract an intent to vest in Local 46 the authority to compel a contract-employer to employ or retain in employment a job applicant sent to the contractor through the Hiring Hall.

"I adhere to the conclusion reached in my original decision in this matter, Local 46 did not become Mr. Foreman's employer. It had no power to compel Perini Associates to continue Mr. Foreman in employment. It did have an obligation to investigate Mr. Foreman's complaint. Had it ascertained that the employer's action was racially discriminatory, or that the employer's action might subject the Union to the possibility of a charge that Rule VII of the Hiring Hall Rules had been violated it could have applied to the Administrator for relief. For its failure to do so, it was assessed four (4) weeks pay in favor of Mr. Foreman."

The Administrator then makes a key finding that the adoption of the principle urged by counsel representing Mr. Foreman:

"will not, in my judgment, serve to insure the fullest exercise of responsibilities mandated to Local 46 by the Settlement Stipulation or the Hiring Hall Rules and Regulations".

It was from this decision that the Movant-Appellant sought a reversal from the District Court and it is from the upholding of that decision that this appeal is made.

SUMMARY OF THE ARGUMENT

We will argue herein that the order appealed from was properly issued by the Court. In the light of the background of this case, the Administrator was fully empowered by the parties to hear and determine the complaint brought by the Movant-Appellant and his findings should be treated as the findings of an arbitrator or an administrative agency and should not be disturbed so long as he stays within the terms of the settlement agreement.

We will also argue that the errors attributed to the Administrator which the Court fully reviewed and dismissed as lacking merit are not matters which this Appellate Court should be concerned with and in any event do not constitute errors which would cause a reversal of the lower Court's order.

POINT ITHE DISTRICT COURT ACTED PROPERLY
IN DISMISSING MOVANT'S MOTION AND
SUSTAINING THE DECISION OF THE
ADMINISTRATOR

The role of the Administrator in this case has been the subject of judicial scrutiny, 328 F.Supp. 429; 471 F 2d 408 (2d Cir. 1973) and it has been recognized as one fulfilling a very desirable function. The United States government, through the Justice Department, and the Union agreed to the appointment of the Administrator and vested him with broad powers very much similar to that of an arbitrator under a collective bargaining agreement. As pointed out earlier, he was given the right to make final and binding awards in applying and interpreting the terms of the settlement agreement. While it is true that he is a creature of the court and his decisions are subject to judicial review, his determinations should be accorded the same weight as an arbitrator or an administrative agency.

Judge Frankel, in dismissing the motion, pointed out that the Movant "has misconceived both the issues before the Administrator and the corresponding premises of his rulings." This misconception still prevails on this appeal.

The Movant-Appellant relies most heavily on the case of Albemarle v. Moody, 442 U.S. 405 (1975) for his claim of greater back pay than the four weeks granted to him. He argues erroneously that because this proceeding started as a Title VII action that statute provides the remedy to be applied here. The fact is, as the record clearly shows, that the Title VII action was resolved by the parties by the settlement agreement which became an order of the court. It was of this agreement that Judge Frankel stated:

"The somewhat novel and perhaps most interesting part of the agreement is its provision creating the office and function of an "Administrator". This official, it is provided, is to be 'an impartial person' appointed by the court." United States v. Wood, Wire and Metal Lathers, International Union, Local 46, 328 F. Supp. 429.

He then went on to enumerate all the powers given by the parties to the Administrator under the settlement agreement which have been stated earlier herein.

It was pursuant to these powers that the Administrator acted and the failure of the Movant-Appellant to recognize this and his desire to treat this grievance as an original Title VII action that undoubtedly led Judge Frankel to the conclusion that the Movant-Appellant has misconceived the issues before the Administrator and the premises from which he acted,

The role of an impartial person vested with the powers given by the parties to the Administrator was treated by the United States Supreme Court in United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, when it defined the relationship between the court and an arbitrator where the interpretation of provisions of a collective bargaining agreement was involved. The Supreme Court stated that where the arbitrator's decision concerns construction of the contract, "the courts have no business overruling him because their interpretation of the contract is different from his".

Similarly the Supreme Court, in reviewing an appeal from a decision of the Railway Adjustment Board held that the Board's interpretations must stand unless they are "wholly baseless and completely without reason". Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257, 261; 86 S. Ct., 368; 15 L. Ed. 308, 60 LRRM 2496 (1965).

The Administrator's decision here shows a careful study of the situation before him and a reliance upon the language of the Agreement and the Hiring Hall Rules and Regulations and the balancing of all the factors involved, notably the absence of the employers as parties to the proceeding, to reach, what in his judgment was an equitable result. As he concluded in his decision of September 27, 1976, "The adoption of the principle urged by counsel representing Mr. Foreman will not, in my judgment, serve to insure the fullest exercise of responsibilities

mandated to Local 46 by the Settlement Stipulation or the Hiring Hall Rules and Regulations".

It is significant to note that throughout his brief the Movant-Appellant speaks of the Union's violation of Rule VII, implying that it was because of such violation that he lost his job and his earnings and was therefore entitled to full back pay. This is contrary to the facts and to the findings of the Administrator, who held, very specifically, that his earlier decision was "not a determination that Local 46 caused Foreman to lose his job or his earnings". In the light of that ruling it would be most unfair to saddle the Union with a back pay remedy treating it as though it were the employer.

Even the Title VII statute, 42 U.S.C. Sec. 2000-5(g) provides that the court may "order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate".

Thus, the law itself puts the burden on the offender where it belongs and provides for equitable relief. The only thing the Union was found guilty of in this case was not pursuing an aggressive investigation into the cause for termination and for this dereliction of duty it was assessed four weeks pay. Under the circumstances and bearing in mind the Administrator's finding that the Union was not the malefactor which caused Foreman to lose his job or his earnings, the Administrator arrived at an equitable result.

It is also worthy to note that 42 U.S.C. Sec. 2000-5(g) prohibits any payment of back pay if the individual was "discharged for any reason other than discrimination on account of race." Thus the Administrator's acceptance of the independent investigation of the Federal Environmental Protection Agency that the discharge was not based on race would foreclose any make whole back pay remedy.

POINT II

THE ADMINISTRATOR'S DECISIONS
WERE FREE OF REVERSIBLE ERROR

The Movant-Appellant in its Points II, III, IV and V raises alleged errors on the part of the Administrator, all of which were reviewed by Judge Frankel and dismissed as lacking in merit.

In Point II the Administrator is accused of erroneously permitting the Union to relitigate the issue of liability. Once again the Movant-Appellant makes the mistake of treating this case as a Title VII action where the Union was found guilty of a violation of the law and the matter then proceeded to a back pay determination. The cases cited in his Point II are inapposite to the case at bar.

It must be reiterated that the broad range of the Administrator's powers and duties give him the right to decide any question arising under the settlement agreement, "acting either on his own initiative or at the request of any interested person". Thus he is never foreclosed from making an inquiry or accepting evidence on any matter before him to the end that an equitable result be reached.

Point III alleging error in relying upon the investigation by the United States Environmental Protection Agency calls for the same response. The Administrator found the Union guilty of but one thing, failure to make an investigation into the cause of the termination. In his decision of September 27, 1976 he stated that had the Union ascertained that the employer's action was racially discriminatory it could have appealed to the Administrator for relief. In lieu of having made the kind of investigation the Administrator felt appropriate, the Union presented to him the finding of this governmental agency that the discharge was not based on racial considerations. The Administrator rightly concluded that he could not ignore this information, along with other factors, in making his decision. He does not state that this information was dispositive of the issue but merely that it was something worth considering.

Point IV needs little or no response. An impartial person agreed upon by the parties to hear disputes has the sole authority to hear the testimony of witnesses, judge their credibility and accord whatever weight he deems the testimony to be worth. Courts will not upset arbitrators' awards, even where there are mistakes of fact or law. Matter of Exercycle Corp., 9 N.Y. 2d 329, 215 N.Y.S. 2d 353, 174 N.Y. 2d 463; Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 241 F. 2d 894 (2 Cir. 1961)

As to Point V, again it is alleged that an error was committed in applying "gang seniority" rather than "job site" seniority. It must be remembered that the instant case was the first case to come before the Administrator involving the interpretation and application of Hiring Hall Rule VII, the rule that was devised by the Administrator and imposed upon the Union over its vehement objections. The language in question states in part:

"No workman shall be laid off until all workmen of his job performing the same class of work who commenced work subsequent to him have been laid off".

The phrase "performing the same class of work" has never been defined. The administrator obviously felt there was some significance in the fact that other men "working in the cofferdam gang with Mr. Foreman were also laid off".

As the man vested with the power to interpret and apply and as the author of the Rule itself, it is rather presumptuous on the part of the Movant-Appellant to state that it is clear under the Hiring Hall Rules and Regulations that seniority is determined by seniority on the site. Apparently Judge Frankel felt the same way for he had no hesitancy in finding that the allegations of errors lack merit, which they do.

CONCLUSION

For all of the above reasons the appeal should be dismissed.

Respectfully submitted,

Dated: April 22, 1977

DORAN, COLLERAN, O'HARA, POLLIO
& DUNNE, P.C.,
1140 Avenue of the Americas
New York, New York 10036

Attorneys for Defendants-Appellees

WALTER M. COLLERAN
Of Counsel

Rec 4/27/77
11 AM
Walt & Danka